Editor's note: Appeal filed, Civ. No. A98-0126 (D. Alaska, April 22, 1998); dismissed, (claims barred by res judicata effect of two class actions) (Nov. 2, 1999); relief from judgment denied, (Feb. 1, 2000); appeal filed, No. 00-35325 (9th Cir. April 3, 2000) aff'd (Nov. 8, 2001), 271 F.3d 1160.

UNITED STATES
v.
MARY T. AKOOTCHOOK
BETTY BROWER

IBLA 90-206, 90-207 Decided April 22, 1992

Appeals from decisions of Administrative Law Judge John R. Rampton, Jr., rejecting Native allotment claims F-16286 and F-16291.

Affirmed.

1. Alaska: Native Allotments

A Native allotment application filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), is properly rejected when the applicant failed to establish that qualifying use and occupancy was independently initiated. Use and occupancy as a minor child in the company of and under the supervision of one's parents is not considered independent.

APPEARANCES: Daniel Cadra, Esq., Barrow, Alaska, for appellants; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Mary T. Akootchook and Betty Brower have appealed from separate decisions of Administrative Law Judge John R. Rampton, Jr., dated January 3, 1990, rejecting Native allotment claims F-16286 (Akootchook) and F-16291 (Brower). Akootchook and Brower are sisters and the children of Fred and Dorothy Gordon.

On March 22, 1972, Akootchook and Brower filed Native allotment applications pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). 1/ They applied for two adjacent parcels of land, Akootchook's parcel A (40 acres) and Brower's parcel (160 acres), situated in unsurveyed secs. 7, 8, 17, and 18, T. 8 N., R. 37 E., Umiat Meridian,

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1/ Repealed effective Dec. 18, 1971, subject to pending applications, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988).

Alaska. 2/ Akootchook's parcel is on the shore of the Niguanak River just before it enters the Oruktalik Lagoon near the Beaufort Sea, and Brower's parcel is on the lagoon. 3/ Both parcels are about 16 miles from the village of Kaktovik on Barter Island, where Akootchook and Brower reside.

Akootchook and Brower both claimed seasonal use and occupancy of the land. In her application Akootchook asserted that she had used the land for hunting and fishing between April and June every year since 1951 and Brower stated that she had used the land for hunting between July and October every year since 1940.

By complaints dated September 13, 1988, and May 17, 1989, the Bureau of Land Management (BLM) sought to invalidate the Brower and Akootchook Native allotment claims, contending that neither had established independent use and occupancy of the land prior to a 1943 withdrawal of the land. Answers were filed and the cases were assigned to Judge Rampton for hearing and decision. After determining that the respective hearings would involve the same counsel and witnesses, Judge Rampton consolidated the cases and held a joint hearing in Kaktovik, Alaska, on September 6 and 7, 1989.

Separate decisions were issued on January 3, 1990. In his decisions Judge Rampton rejected both Native allotment claims based on his finding that Akootchook and Brower had failed to prove that they had initiated qualifying use and occupancy, independent of the use and occupancy of their parents, prior to withdrawal of the land in 1943. Both appealed from Judge Rampton's decisions.

Because of the related nature of the facts adduced at the hearing and the identical legal issue presented, we find it appropriate to consolidate the appeals.

There is no dispute that the land sought by Akootchook and Brower was "withdrawn from * * * entry under the public-land laws of the United States" on January 22, 1943, by Public Land Order No. (PLO) 82 (8 FR 1599 (Feb. 4, 1943)), and has remained withdrawn from such appropriation at all times after that date. 4/ Under the Act of May 17, 1906, as amended, a Native

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2/ Having been withdrawn from entry under the public land laws in 1943, the land was not unreserved on Dec. 13, 1968, and their allotment applications could not be legislatively approved pursuant to section 905(a)(1) of Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1988). See Catherine Angaiak (On Reconsideration), 65 IBLA 317, 318 n.1 (1982). Therefore, the allotment applications must be adjudicated pursuant to the Act of May 17, 1906, as amended, and its implementing regulations.

3/ Akootchook also applied for a 40-acre parcel situated in unsurveyed sec. 16, T. 9 N., R. 34 E., Umiat Meridian, Alaska, described as parcel B in her application. Akootchook's parcel B is not involved in this appeal.

4/ On Dec. 6, 1960, PLO 2215 (25 FR 12599 (Dec. 9, 1960)) revoked PLO 82 in relevant part. However, PLO 2215 noted that the land would continue to be withdrawn pending action on an application for withdrawal for inclusion in

allotment applicant is entitled to up to 160 acres of "vacant, unappropriated, and unreserved" land upon satisfactory proof of "substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. §§ 270-1 and 270-2 (1970). Thus, any claim of use and occupancy must have been initiated prior to the January 22, 1943, withdrawal. See Andrew Gordon McKinley (On Reconsideration), 61 IBLA 282, 284-85 (1982).

[1] The use and occupancy must also be "substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use." 43 CFR 2561.0-5(a). To have the use and occupancy qualify, the land must be used and occupied by the applicant as an independent citizen acting on his or her own behalf or as head of a family, and, not as a minor child in the company of and under the supervision of one's parents. See, e.g., United States v. Bennett, 92 IBLA 174, 176-77 (1986); Andrew Petla, 43 IBLA 186, 192 (1979); Arthur C. Nelson (On Reconsideration), 15 IBLA 76, 78 (1974).

The primary issue presented to Judge Rampton in both cases was whether independent use and occupancy had been initiated by Akootchook and Brower prior to withdrawal of the land on January 22, 1943. After reviewing all the evidence, Judge Rampton concluded that neither had demonstrated use and occupancy of the land as independent citizens prior to that date. On appeal, appellants do not take exception to that finding, but challenge the standard of independent use and occupancy adopted by the Board in Nelson, arguing that this interpretation is not supported by the Act of May 17, 1906, as amended, or its implementing regulations. Appellants also contend that the requirement imposed in Nelson and subsequent cases frustrates the purpose of the Act and runs counter to the duty to liberally construe statutes passed for the benefit of Indians (including Alaskan Natives). Appellants actively seek to have us overturn Nelson and its progeny.

Prior to January 22, 1943, both appellants lived with their parents at Griffin Point, which is about 3 miles from the parcels. A field examination of both allotment parcels was conducted by BLM in July 1983. Both appellants accompanied the examiners and exhibited personal knowledge of the area. The only improvement found on either parcel was a campsite. However, BLM examiners concluded that the parcels contained the resources necessary to support the claimed subsistence use of the land. See Exhs. G-5 at 4, G-17 at 4. The record also contains unrebutted testimony by appellants that they had used and occupied the land on a seasonal basis for at least 5 years.

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fn. 4 (continued)
the Arctic National Wildlife Range. On that same date the land was "withdrawn from all forms of appropriation under the public land laws" with the creation of the Arctic National Wildlife Range by PLO 2214 (25 FR 12598 (Dec. 9, 1960)). On Dec. 2, 1980, section 303 of ANILCA, P.L. 96-487, 94 Stat. 2390 (1980), created the Arctic National Wildlife Refuge, which included the land and continued the withdrawal of the land from all forms of appropriation under the public land laws. See 94 Stat. 2393 (1980).

Akootchook, who was born on March 8, 1931, and Brower, who was born on February 2, 1933, were near 12 and 10 years old when the land was withdrawn. Both claim to have used the land prior to 1943, but there is no evidence that either used or occupied the land independently. They were always in the company of a parent or an older sibling, who did the actual fishing and hunting. See Tr. 56-57, 86-87, 102, 107-09 (Akootchook); 50, 55-57, 62, 77, 79, 107-09 (Brower). Appellants admit that prior to 1943 their use of the land was "in conjunction with" their families (Akootchook Statement of Reasons for Appeal (SOR) at 4; Brower SOR at 4).

Neither the Act of May 17, 1906, as amended, nor its implementing regulations specifically require use and occupancy of claimed land as an independent citizen. Nor is this language found in the legislative history of that Act. The requirement for independent use is the result of subsequent interpretation of the Act and its implementing regulations, and is a direct outgrowth from the regulatory language calling for "substantial actual possession and use of the land, at least potentially exclusive of others." 43 CFR 2561.0-5(a).

A person claiming land to the potential exclusion of others should be able to lay claim to the land to the exclusion of all others. The regulation makes no distinction between other family members and absolute strangers. See United States v. Bennett, supra at 177; Andrew Petla, supra at 193. There being no regulatory distinction between strangers and family members, the potential ability to exclude others must extend to other members of the family. Since Nelson the Board's decisions have uniformly held that a minor applicant must demonstrate use and occupancy independent of his or her family members to establish qualifying use and occupancy under the Act of May 17, 1906, as amended, and its implementing regulations. 5/

Appellants also argue that the independent use and occupancy requirement is contrary to the purposes of the Act, which recognized that Alaskan Natives typically use and occupy land communally, i.e., in the case of minors, in the company of family members. In fact, the Act and its implementing regulations are generally inimical to communal use by Alaskan Natives. See Andrew Petla, supra at 200 (Burski, A.J., concurring in the result). When 43 CFR 2561.0-5(a) (formerly 43 CFR 2212.9-1(c)(1)) was promulgated in 1965 (see 30 FR 3710 (Mar. 20, 1965)), the Department formally adopted a statutory interpretation requiring substantial actual possession and use to the potential exclusion of others, as expressed in an earlier Departmental interpretation to the same effect. 6/ See Allotment of Land

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5/ Appellants cite a number of concurring and/or dissenting opinions by a former member of the Board in support of their position. See Andrew Petla, supra at 204 (Goss, A.J., dissenting); Christina Laverne Hanlon, 23 IBLA 36, 40 (1975) (Goss, A.J., concurring in part and dissenting in part); James S. Picnalook, Sr., 22 IBLA 191, 195 (1975) (Goss, A.J., concurring specially).

6/ This interpretation was in turn derived from an earlier judicial pronouncement regarding the predecessor of the Act of May 17, 1906, in which

to Alaska Natives, 71 I.D. 340, 358. Substantial actual possession and use to the potential exclusion of others runs contrary to the cultural proclivity for Native communal use of land.

We cannot accept appellants' suggestion that the Act has been interpreted to preclude minor children (over the age of 5 years) from qualifying for an allotment of land. See William Bouwens, 46 IBLA 366, 369-70 (1980). We accept that independent use can generally be made by an adult member of a family when in the company of minor children, without proof to the contrary, but do not accept the converse, i.e., that a minor child can generally engage in independent use of the land when in the company of and under the supervision of his or her parents. When there is specific proof that the minor child acted independently, focusing on the capacity of the individual child and his or her actual activity (vis-a-vis that of parents, siblings, and others), the regulatory requirement of "substantial actual possession and use of the land, at least potentially exclusive of others" can be satisfied by a minor child. See id. at 370-71.

Appellants incorrectly argue that a minor should be allowed to initiate use and occupancy as a dependent family member prior to a withdrawal and perfect that use and occupancy as an independent citizen subsequent to withdrawal when use and occupancy for a 5-year period need only be initiated prior to a withdrawal. 7/ See Akootchook SOR at 20. An applicant acquires no rights vis-a-vis the United States that would preclude withdrawal until the applicant has initiated qualifying use and occupancy under the statute.

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fn. 6 (continued)
the court imposed the requirement that use or occupancy was to be "'notorious, exclusive and continuous, and of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land is in the use or occupancy of another.'" United States v. Flynn, 53 IBLA 208, 227, 88 I.D. 373, 383 (1981) (quoting from United States v. 10.95 Acres of Land in Juneau, 75 F. Supp. 841, 844 (D. Alaska 1948)); see also Angeline Galbraith, 97 IBLA 132, 168-69, 94 I.D. 151, 170 (1987).

7/ Appellants also argue, by way of analogy, that if an applicant is permitted to file an application prior to becoming head of a family or 21 years of age and then satisfy that statutory requirement, an applicant should similarly be allowed to perfect independent use after a withdrawal. See Akootchook SOR at 20 n.8. This analogy is not well taken. There is no requirement that an applicant be either head of a family or 21 years of age at the time of making his or her application. This is required only at the time the allotment is finally made. See 43 U.S.C. § 270-1 (1970). No adverse consequence attaches because an application is filed by a minor. The minor may subsequently perfect the application without penalty by initiating qualifying use and occupancy as an independent citizen. However, adverse consequences do result when a minor has not initiated qualifying use and occupancy as an independent citizen prior to withdrawal. The withdrawal precludes subsequent initiation of qualifying use and occupancy.

If it can be shown that the rights were properly initiated prior to a withdrawal the applicant can perfect the application by continued qualified use and occupancy for the requisite 5-year period, with the remainder of the period of use and occupancy being completed after the withdrawal. See United States v. Bennett, supra at 175. If qualifying use and occupancy has not been initiated prior to withdrawal the withdrawal will attach. Thereafter, use and occupancy cannot be initiated, and an applicant can gain no rights. See Akootchook v. U.S. Department of the Interior, 747 F.2d 1316, 1320 (9th Cir. 1984), cert. denied, 471 U.S. 1116 (1985); Heirs of Doreen Itta, 97 IBLA 261, 266 (1987).

Appellants also argue that they are entitled to allotments because their parents would have qualified for allotments by virtue of the family's use and occupancy of the land. According to appellants, to do otherwise would improperly preclude a surviving family member, who was a minor child when the family used and occupied the land, from obtaining title to that land, because there is no basis for concluding that the benefits afforded by the Act should not be available to the minor child. This argument runs contrary to their claim of entitlement to Native allotments. A minor child who has not established independent use cannot benefit from his or her parent's use of the land, even though the child ultimately becomes the sole surviving family member. A claim of entitlement under the Act of May 17, 1906, as amended, is personal to the claimant. See United States v. Bennett, supra at 176-77. The applications now before us were not made by Fred or Dorothy Gordon. If they had claimed use and occupancy of the land claimed by Akootchook or Brower their claim would be to the exclusion of Akootchook and Brower. A parent's entitlement is to the exclusion of the children and family use and occupancy cannot benefit both the parents and the minor children. See Andrew Petla, supra. We are not concerned with the parents' entitlement. 8/

Appellants also claim that George v. Hodel, No. A86-113 (D. Alaska Apr. 30, 1987), supports their position that a minor's use and occupancy need not be independent. 9/ In its April 30, 1987, judgment, the court held that the Department's interpretation that "an allotment applicant's use and occupancy be independent and exclusive of immediate family members * * * is unreasonable and inconsistent with the terms of the Alaska Native Allotment Act and the Act's regulations" (Exh. A attached to BLM's Posthearing Brief at 1-2). George is distinguishable on its facts. In the George case there

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8/ We note that appellants' father apparently sought his own Native allotment in the area of Griffin Point (F-16308). See Exh. G-21.

9/ Appellants also cite Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985), for the proposition that the Board's interpretation of the Act to require use independent of family members is "unreasonable" (Akootchook SOR at 15). We find nothing in Olympic contrary to the Board's interpretation of the Act. The primary question in that case was whether the heir of a deceased applicant is entitled to amend an erroneous land description in the application. It did not involve what constitutes qualifying use and occupancy.

was evidence that the applicant had achieved adulthood pursuant to Tlingit tradition at the time of withdrawal, as well as evidence of his independent use and occupancy of the land prior to that date. As noted above, achieving adulthood is not an absolute requirement, and with proof of independent use and occupancy as a minor, the regulatory requirements can be satisfied by a minor. In this case neither applicant provided any evidence of either having achieved adulthood or of independent use and occupancy prior to withdrawal. See, e.g., Tr. 20, 26, 77, 79, 87, 102, and 107-09.

Judge Rampton properly rejected appellants' Native allotment claims when they failed to demonstrate that as minor children they had initiated qualifying use and occupancy as independent citizens prior to withdrawal of that land.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

R. W. Mullen
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge